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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MAURICE WILSON,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF COUNCIL ON RELIGIOUS FREEDOM AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

The Council on Religious Freedom is a national nonprofit corporation formed to uphold and promote the principles of religious liberty. Its Board of Directors is composed of individuals who are active in religious affairs and who recognize the importance of preserving and promoting the free exercise of religion and oppose encroachment by private or governmental agencies which limits or inhibit the free exercise of religion. The Council on Religious Freedom opposes government burdens on religious practices or government actions requiring an individual to choose between the practice of religion and governmental benefits otherwise available to him.

Both petitioner and respondent, through their respective counsel of record, have consented to the filing of this brief. Their letters of consent accompany this brief.

STATEMENT OF THE CASE

A. Summary of Facts

Thomas A. Ricci, Administrative Law Judge for the National Labor Relations Board, considered a complaint issued upon a charge filed by the Grand Rapids City Coach Lines, Inc. The sole issue presented was whether Local Union 836, Amalgamated Transit Union (hereafter "Union") unlawfully demanded that the company discharge Maurice Wilson, an employee who refused to authorize the company to deduct union dues and initiation fees on his behalf for the Union (*see* Decision of Administrative Law Judge in Appendix to Petition for Writ of Certiorari at 16a-17a).

The union requested the company to discharge Wilson for failure to pay union dues and initiation fees. When the company refused, the union filed a grievance to compel the company to live up to the collective bargaining agreement. While no action was taken on the grievance, the company filed a charge with the NLRB (*id.* at 17a-18a).

Wilson refused to pay the union dues or initiation fees because it was against his personal convictions to join a union or pay its dues. Wilson claimed to be a member of a church called "The Body of Jesus Christ." (*Id.* at 18a). When he first claimed a religious privilege as the basis for his refusal to pay union dues, the union officers, aware of the statutory language of Section 19 of the 1980 amendment to the National Labor Relations Act, asked Wilson to which church or religious organization he belonged. Wilson admitted that the assembly which he attended was "not a denomination of religion organization established by a constitution, or a man" (*id.* at 19a-20a). Although Wilson mentioned the phrase "faith assembly," saying that it was in Warsaw, Indiana, he did not have the address of the group. He also gave the name of a "minister" who had been dead for three years. The union could not locate any such organization in Warsaw, Indiana (*id.* at 20a).

Thereupon, the Administrative Law Judge recommended that the complaint be dismissed (*id.* at 21a).The NLRB adopted the recommended order of the Administrative Law Judge (*see* Decision and Order of the NLRB as set forth in Appendix to Petition for Writ of Certiorari at 13a-15a).

The company took no further action. However, Wilson filed a petition for review of the decision and order with the Sixth Circuit Court of Appeals. That court in *Wilson v. NLRB*, 920 F.2d 1282 (6th Cir. 1990), found Section 19 to violate the Establishment Clause of the First Amendment. Contrary to Wilson's requested remedy, the court failed to extend the statute to include individuals, such as Wilson, whose refusal to join or pay dues to a labor union was based upon a personal belief and not membership in a religious group which held conscientious objections to joining or financially supporting a labor organization.

B. Summary of Legislative History

The legislative history leading up to the present Section 19 of the NLRA is instructive. In 1965, Congress considered a proposal to repeal Section 14(b) of the National

Labor Relations Act. That section exempted persons from having to financially support labor organizations through membership fees in states where union security provisions were prohibited by state law, so-called "right-to-work" states. *To Repeal Section 14(b) of the National Labor Relations Act: Hearings on S. 256 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Works*, 89th Cong., 1st Sess. 9 (1965) [hereinafter cited as *Senate Section 14(b) Hearings*].

Several religious groups viewed the repeal of Section 14(b) with alarm and as a threat to persons in the right-to-work states who had refused, for religious reasons, to join a union. Responding to these concerns, Congresswoman Edith Green of Oregon sought to exempt such persons from having to join or pay dues to a labor organization. 111 Cong. Rec. H17,936 (daily ed. July 28, 1965).

Congresswoman Green described the plight of persons having religious convictions against joining, paying dues or participating in a labor organization. She identified several religious groups whose members could not in good conscience belong to a labor organization: Seventh-day Adventists, Amish, Mennonites, the Plymouth Brethren and certain bodies affiliated with the National Association of Evangelicals. Green saw the matter as "an issue of conscience." Future supporters of an accommodation of these beliefs would use her phrase in calling for a "Conscience Clause" to the National Labor Relations Act (hereinafter NLRA).

During Senate subcommittee hearings on S. 256, W. Melvin Adams, a clergyman with the Seventh-day Adventist Church, stated that the Church had no position concerning the repeal of Section 14(b). Instead, Adams informed the Senators that a sizable minority of U.S. citizens could *not* join or support labor unions because of religious convictions. He identified several religious groups that had such teachings: Seventh-day Adventists, National

Association of Evangelicals, Mennonites, Plymouth Brethren, Christadelphians, Old German Baptists and Christian Missionary Alliance. *Senate Section 14(b) Hearings, supra*, 243-245.

Adams articulated the Seventh-day Adventist Church's teachings on the matter of membership and/or financial support of labor organizations. Adams described efforts by his Church and the American Federation of Labor to negotiate a "Basis of Agreement" involving the payment of union dues equivalency to a benevolent fund as a resolution of the dilemma faced by Adventists. However, the good intentions had proved ineffective. Adams called for "some kind of federal legislation" to protect these people. *Senate Section 14(b) Hearings, supra*, 261.

Cyril F. Dadd, a representative of the Plymouth Brethren, also petitioned the subcommittee for a religious accommodation. He called for "the incorporation of a conscience clause into the labor law." *Senate Section 14(b) Hearings, supra*, 268.

The testimony of these religious leaders before the Senate subcommittee proved successful. The full Senate Committee on Labor and Public Welfare reported a bill which contained the following language:

> (C) if he has reasonable grounds for believing (i) that such employee has been issued a certificate by the National Labor Relations Board either that he is a member of a religious sect or division thereof, the established and traditional tenets or teachings of which oppose a requirement that a member of such sect or division join or financially support any labor organization, or that, even though he is not a member of such a religious sect or division thereof, *he holds conscientious objections to membership in any labor organization based upon his religious training and beliefs in relation to a Supreme Being involving duties superior to those arising from any human relation*, and (ii) either that such employee has timely paid, in lieu of periodic dues and initiation fees, sums equal to such

> dues and initiation fees to a non-religious charitable fund exempt from taxation under Section 501(c)(3) of the Internal Revenue Code, designated by the labor organization, or that the labor organization has failed upon request to designate such a fund or waives such payment, or (iii) that such employee has complied with alternative arrangements mutually agreed upon by such employee and such labor organization.

S. Rep. No. 697, 89th Cong., 1st Sess. 9 (1965) (emphasis added).

The Conscience Clause, however, did not survive the 89th Congress. The chair ruled Green's amendment as non-germane in the House of Representatives. 111 Cong. Rec. H17,937 (daily ed. July 28, 1965). A successful Senate filibuster against the repeal of Section 14(b) took with it the Senate's version of the Conscience Clause. 111 Cong. Rec. S26,581 (daily ed. October 11, 1965).

Congress again addressed the Conscience Clause in 1973 during efforts to give postal employees the right to strike and to organize a union shop. Section 1209(c) of the Postal Reorganization Act of 1970 [39 U.S.C.] had guaranteed:

> Each employee of the Postal Service shall have the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization or to refrain from any such activity, and each employee shall be protected in the exercise of this right.

On April 10, 1973, W. Melvin Adams of the Seventh-day Adventist Church again appeared before a Congressional subcommittee advocating a Conscience Clause for Adventist postal employees from the consequences of the proposed changes to 39 U.S.C. § 1209(c), As before, Adam's testimony referred to other groups that opposed union membership. *Negotiating Equality for Postal Employees and Uniformity in Labor Relations: Hearings on H.R. 1282 and H.R. 5312 Before the Subcomm. on Postal Facilities, Mail, and Labor Management of the House Comm. on Post*

Office and Civil Service, 93rd Cong., 1st Sess. 30 (1973) [hereinafter cited as *Postal Hearings*].

Adams referred to a letter from labor leader George Meany which recognized there existed a need by unions and employers to "accommodate religious objections with regard to union security arrangements." *Postal Hearings*, *supra* 31. Adams justified special legislative protection for religious beliefs as consistent with the Free Exercise Clause of the First Amendment. In support of this argument, he relied on draft law exemptions; state Sunday law exemptions; Amish exemptions from social security and school attendance laws; and Jehovah's Witness exemption from pledging allegiance to the American flag. *Postal Hearings*, *supra* 33. Adams recommended the payment of a "dues equivalent" to a non-union, non-religious charity as the principal components of a Conscience Clause. The National Council of Churches, the National Catholic Welfare Conference, and a Jewish organization joined with Adams in calling for preservation of the existing "open shop" language in the Postal Reorganization Act, or in the alternative, the passage of a Conscience Clause to protect workers requiring a religious accommodation. *Postal Hearings*, *supra* 32.

Both the Senate and the House of Representatives approved bills containing a Conscience Clause. In conference committee, however, the Conscience Clause was deleted and section 1209(c) of the Postal Reorganization Act remained in tact.

Congress next considered the Conscience Clause in 1974. On April 2 the Senate Labor and Public Welfare Committee reported S. 3203, 93rd Cong., 2nd Sess., a bill to amend the NLRA by extending the Act's coverage to nonprofit hospitals. S. Rep. No. 93-766, 93rd Cong., 2nd Sess. (1974). The reported bill did not contain a Conscience Clause. However, during Senate debate on the bill, Senator Sam J. Ervin, Jr., offered a Conscience Clause, exempting persons from the dues and membership provisions of the NLRA who, for religious reasons, refused to join or fi-

nancially support a labor union. In support of his proposal, the Senator used the Seventh-day Adventist Church as illustrative of the problem being addressed. 120 Cong. Rec. S12,950 (daily ed. May 2, 1974). Opposed by Senator Jacob Javits, Ervin's efforts failed. The bill passed the Senate on May 7, 1974 without a Conscience Clause. 120 Cong. Rec. S13,543.

During a House debate on H.R. 13,678, 93rd Cong., 2nd Sess., a bill identical to S. 3203 reported by the House Education and Labor Committee on May 20, 1974 (H.R. Rep. No. 1051, 93rd Cong., 2nd Sess. (1974)) proponents of the Conscience Clause succeeded where the Senate had failed. Congressman John Erlenborn of Illinois called for an accommodation, by way of a Conscience Clause amendment. 120 Cong. Rec. H4591 (daily ed. May 30, 1974). Erlenborn called his amendment the "Religious Freedom Amendment." It allowed the payment of a union dues equivalent to a charity rather than the federal treasury. It was narrowly drawn to "affect only a very small number of people because there are only a few religions that do hold this religious belief. One such religion is the Seventh-day Adventists." 120 Cong. Rec. H4603.

Congresswoman Green of Oregon, the first proponent of a Conscience Clause, spoke in support of the amendment. 120 Cong. Rec. H4603. She identified seven religious groups that taught members not to join or financially support a labor organization. Green expressed concern over the unfairness of forcing an employee to choose between loss of a job or violation of conscience; and reminded the House of other religious accommodations, such as the exemption of the Amish from the Social Security Act; and exemption of those opposed to war from military conscription acts. 120 Cong. Rec. H4604.

Specifically, the Erlenborn amendment provided:

> Sec. 19. An employee of a health care institution who is a member of and adheres to tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or fi-

> nancially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment.

120 Cong. Rec. H4602. It exempted *employees* of not-for-profit hospitals from membership in or financial support of labor organizations. H.R. 13,678, together with Erlenborn's Conscience Clause, passed the House on May 30, 1974, by voice vote. 120 Cong. Rec. 4604.

The Senate and House referred the legislation to a conference committee. The following compromise language was added to the Erlenborn amendment:

> Except that such employee may be required, in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a non-religious charitable fund exempt from taxation under Section501(c)(3) of the Internal Revenue Code chosen by such employee from a list of at least three such funds, designated in a contract between such institution and a labor organization, or if the contract fails to designate such funds, then to any such fund chosen by the employee.

See H.R. Rep. No. 1175, 93rd Cong., 2nd Sess. 3 (1974), and the S. Rep. No. 988, 93rd Cong., 2nd Sess. (1974). In addition to minor editorial changes, the Senate receded to the House version containing the Conscience Clause. The amendment to the NLRA was passed by the Senate (120 Cong. Rec. S22,583 (daily ed. July 10, 1974)) and the House (120 Cong. Rec. H22,949 and H22,950 (daily ed. July 11, 1974)). It became Public Law 93-360, 29 U.S.C. § 169.

Supporters of the Conscience Clause continued their efforts on Capitol Hill seeking to extend the exemption of Section 19 to all employees, not just those working for non-profit hospitals. In 1976, Congressman Erlenborn introduced H.R. 1528, 94th Cong., 2nd Sess. (1976), to accomplish this purpose.

A House subcommittee held hearings on July 28, 1976. Chairman Thompson acknowledged that the "problems of accommodating the values of the 'union shop' agreement with the values of religious freedom has been with us for some time." He traced the legislative history of proposed solutions, beginning with the efforts to repeal Section 14(b) of the Taft-Hartley Act in 1965; the Postal Reform Act of 1970; and the health care amendments of 1974. *Exemption of Religious Objectors from Union Shop Dues Obligations: Hearings Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 94th Cong., 2nd Sess. 1 (1976). [Hereinafter cited as *Religious Objectors Hearings*.]

At the hearings, Representative Erlenborn presented a prepared statement in support of the bill. He once again identified the seven religious groups that had religious problems joining or financially supporting labor unions. People "should not have to choose between their religion and their jobs." *Religious Objectors Hearings*, *supra*, 28. Erlenborn argued that the bill did *not* establish a religion. Rather, it dealt with conscientious objection based on religion. "It seeks to rationalize the constitutional guarantee of freedom of religion and freedom to practice religion and our federal labor laws." *Religious Objectors Hearings*, *supra*, 28-30.

Thompson's own bill (H.R. 3384, 95th Cong., 1st Sess. (1977) provided the vehicle which brought the Conscience Clause expansion before the 95th Congress. The legislation proposed to amend Section 19 of the NLRA by striking the words "of a health care institution" after the words "Any employee," and adding a new sentence at the end: "Proof of such payments must be made on a monthly basis as a condition of continued exemption from the requirement of financial support to the labor organization, subject to such rules and regulations as the Board may prescribe." The House Committee on Education and Labor reported the bill on September 27, 1977. The report described the conflict which existed between a person's religious beliefs and a requirement created by the federal labor laws. H.R.

3384 was to be an accommodation of such beliefs. H.R. Rep. No. 768, 95th Cong., 1 Sess. 2, 5 (1977).

There was widespread support for the bill in the House of Representatives. During floor discussion, Thompson cited members of the Seventh-day Adventist Church as persons whose religious beliefs would be accommodated by the bill. He believed that the legislation "would accommodate the religious beliefs of these persons and thereby reconcile the National Labor Relations Act with Section 701(j) of the Equal Employment Opportunity Act as recently construed in *Cooper v. General Dynamics*, 533 F2d. 163" [5th Cir. 1976]. 123 Cong. Rec. H11,901 (daily ed. November 1, 1977).

It was against this background that the House considered expanding the Conscience Clause exemption to include all employees covered by the NLRA. In so doing, it sought to resolve a suggested conflict between the Civil Rights Act and the NLRA.

Erlenborn observed: "Enactment of this legislation will demonstrate the federal government's abiding concern for the preservation of religious liberty to all those who strictly adhere to the teachings of their religion regardless of how small their numbers." 123 Cong. Rec. H11,904.

Representatives from across the political spectrum joined in supporting the expanded Conscience Clause. The wide support was reflected in the passage of H.R. 3384 by the margin of 400 to 7. 123 Cong. Rec. H11,967 - H11,968. The legislation, however, did not fare as well in the Senate. There it was attached to a controversial labor reform bill and, as had happened to an earlier Conscience Clause, failed to survive a filibuster.

The expanded Conscience Clause amendment to the NLRA was reintroduced in the 96th Congress by Congressman Thompson as H.R. 4774, 96th Cong., 1st Sess. (1979). The full Committee on Education and Labor unanimously reported the bill on September 20, 1979. H.R. Rep. No. 496, 96th Cong., 1st Sess. (1979). The report confirmed the purpose of H.R. 4774: to accommodate an em-

ployee who, because of his religious beliefs, objects to the membership in or financial support of unions. *Religious Objectors Hearings, supra* 2. The bill sought to accommodate those religious beliefs and reconcile the NLRA with Section 701(j) of the Equal Employment Opportunity Act, 43 U.S.C. Sec. 2000e(j).

In addition to removing the phrase "of a health care institution" from Section 19, the amendment added:

> If such employee who holds conscientious objections pursuant to this section requests the labor organization to use the grievance-arbitration procedure on the employee's behalf, the labor organization is authorized to charge the employee for the reasonable cost of using such procedure.

Religious Objectors, supra, 3 (1979). The bill was reported out of the House Education and Labor Committee on October 4, 1979.

Congressman Thompson addressed the House of Representatives in support of the legislation. He described how the bill extended an exception for employees in the health care industry to all employees covered under the NLRA. Thompson explained that the criteria for the exemption was membership in a bona fide religion that had historically held conscientious objections to joining or financially supporting a labor organization. The purpose of this limitation was to prevent the exemption from being used by unscrupulous persons as a union-busting device. He explained that the payment of a dues equivalent would also constitute a reasonable accommodation under Section 701(j) of the Equal Employment Opportunity Act [42 U.S.C.A. §§ 2000e(j)]. 126 Cong. Rec. H760 (daily ed. February 11, 1980).

Congressman Jon Hinson concluded that H.R. 4774 did *not* establish a religion nor favor one religion over another. "It simply allows the 'free exercise' of religion and rationalizes the constitutional guarantee of freedom of religion over federal labor law. By supporting this legislation

we will be endorsing an accommodation to religious conscience not yet found in our court NLRB decisions." 126 Cong. Rec. H761.

Congressman Clausen, supporting H.R. 4774, described the legislation as "the Conscience Clause amendment." 126 Cong. Rec. H761. He observed that: "H.R. 4774 would remove the government from the dubious role of placing a penalty on the person whose religious convictions cause an individual to believe and act differently from a majority of fellow employees who have voted a certain course of action that would cause the religious objector to have to choose between his conscience and economic survival." 126 Cong. Rec. H761.

Thompson confirmed that the legislation was not anti-labor. He stated that if a religious objector asked the union to perform any arbitration services, he would have to pay for such services. 126 Cong. Rec. H763. The House passed the bill under a suspension of the rules on February 12, 1980, by the margin of 349 to 15. 126 Cong. Rec. H796.

Almost ten months later, the Senate had its own opportunity to consider H.R. 4774. Senator John Melcher requested the discharge of the bill from the Senate's Labor and Human Relations Committee. H.R. 4774 was identical to his own bill: S. 1693, 9th Cong., 1st Sess. (1979), which had been introduced in the Senate with 22 co-sponsors. 126 Cong. Rec. S11,678 (daily ed. August 3, 1979). Melcher declared the legislation a religious freedom issue, not a labor issue, and he compared the bill favorably with the Amish social security exemption set out at 26 U.S.C. § 1402; a federal law prohibiting the firing of Roman Catholics who opposed abortions in federally-funded health care facilities, 42 U.S.C. § 300a-7; religiously based exemptions from the draft laws, *Gillette v. United States*, 401 U.S. 437 (1971); and the exemption of church property from taxes, *Walz v. Tax Commission*, 397 U.S. 664. (1970). 126 Cong. Rec. S16,615 (daily ed. December 13, 1980). The bill passed the Senate by a voice vote on December 13, 1980. 126 Cong. Rec. S16,616.

H.R. 4774 became Public Law 96-593, 29 U.S.C. Section 169, when signed by President Carter on December 24, 1980. The President, however, in a statement which accompanied signing of the law, sought to clarify his own understanding:

> In signing H.R. 4774, I want to emphasize that the language in this bill defining conscientious objection is not to be construed in such a way as to discriminate among religions or to favor religious views over other views that are constitutionally entitled to the same status. To put any other construction on this definition would, in my view, create serious constitutional difficulties.

17 *Weekly Compilations of Presidential Documents: Administration of Jimmy Carter*, 2856 (January 2, 1981).

After 15 years of legislative efforts, a Conscience Clause applicable to all workers covered by the NLRA had become a part of the federal labor law of the United States. An accommodation of a person's religious beliefs against membership in or financial support of a labor organization was now assured.

SUMMARY OF ARGUMENT

The record on appeal fails to disclose that Wilson had standing to challenge Section 19 of the NLRA. Nor is there a finding that h objection to the payment of union dues and fees was prompted by religious beliefs held with the same sincerity as those persons identified in Section 19.

The legislative history of the Conscience Clause to the NLRA confirms the congressional intent to lift a burden on the free exercise of religion. Such legislation was necessary because the burden resulted from federal action bearing the imprimatur of the United States Congress.

The legislative history of Section 19 also demonstrates that Congress intended to bring the NLRA into conformity with rights guaranteed by the religious accommodation

provisions of Title VII of the 1964 Civil Rights Act, as amended. The legislative exemption was not designed to discriminate among religions; rather it was narrowly drawn to exclude from the exemption those persons who, for personal, philosophical, or political reasons, would otherwise seek to avoid the union security requirements of a collective bargaining agreement.

Should this Court conclude that Section 19 violates the Establishment Clause because it fails to lift the governmentally imposed burden for all those persons with deeply held religious beliefs who cannot financially participate in union activity, then the Court must act to include those employees in the exemption. Any other remedy would result in a reassertion by judicial fiat of the governmentally imposed burden on the free exercise rights of employees. The inclusion of the additional employees, however, would not be contrary to the legislative will so long as the exemption includes only those who have sincerely held religious beliefs rather than personal, philosophical, or political, objections to union membership.

Argument

I. A BURDEN IMPOSED BY CONGRESS ON RELIGIOUS BELIEF AND PRACTICE CAN BE RELIEVED BY CONGRESS CONSISTENT WITH THE ESTABLISHMENT CLAUSE.

The purpose of Section 19 was not to discriminate between religious denominations nor to provide congressional endorsement for a favored religion. It was, however, narrowly drawn to prevent claims which were not based upon sincere and strongly held religiously based convictions.

Since *Steele v. L&NR Co.*, 323 U.S. 192 (1944), it has been recognized that federal legislation which bestows broad powers on labor unions involves state action. In *Railway Employes' Dept., AFL-CIO v. Hanson*, 351 U.S. 225 (1956), this Court declared that it is the federal government which is the effective force upon the employee in this situation. The collective bargaining agreement has

"the imprimatur of federal law upon it," and "the federal statute is the source of power" by which the right of the individual is "lost or sacrificed." *Id.* at 232.

It is clear from the legislative history that the purpose behind the adoption of Section 19 was to lift a congressionally imposed burden imposed upon a relatively few number of individuals who were members of small religious sects. Representative Clausen, one of the cosponsors of Section 19, in his remarks to the Congress, gave particular attention to three Title VII religious accommodation cases: *Nottelson v. Smith Steel Workers D.A.L.U. 19806*, 643 F.2d 445 (7th Cir. 1980), *cert. denied*, 454 1046 (1981); *McDaniel v. Essex Intern'l Inc.*, 696 F.2d 34, 37 (6th Cir. 1982); and *Anderson v. General Dynamics Convair Aerospace Div.*, 589 F.2d 397 (9th Cir. 1978), *reh'g en banc denied, cert. denied sub nom. International Assoc. of Machinists and Aerospace Workers of America v. Anderson*, 442 U.S. 921 (1979). After summarizing those cases, Rep. Clausen stated:

> The legislative history of the proposed amendment to the National Labor Relations Act indicates that the bill and Title VII were meant to be complimentary. The purpose of the previous bills and the purpose of this bill is to resolve any conflict and to express congressional intent as to the reasonableness of a charity substitution accommodation which all of the federal courts of appeal ruling on the issue have found to be an accommodation acceptable under Title VII

126 Cong. Rec. - House, H761 (daily ed. Feb. 11, 1980).

The purpose of the legislation was to have the National Labor Relations Act parallel Title VII with reference to religious accommodation as to union membership and the payment of union dues. Congress recognized that it was the government that had limited the religious freedom of those members of religious sects which taught its members that they should not join or pay dues to labor organizations. When government is involved in limiting religious freedom, the government may employ affirmative or exemptory measures to restore that degree of religious free-

dom which had existed without the government involvement. This has been referred to as "legislative free exercise" and can be viewed as the effort by the legislature to overcome hostility to a religion by an act of the state. This Court has recognized that Congress has the power to take some affirmative measure or grant an exemption in order to insure that the religious needs of individuals are satisfied. *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987).

In *Wallace v. Jaffree*, 472 U.S. 38, 83 (1985), Justice O'Connor, in discussing the resolution of conflicts that may occur between the Free Exercise and Establishment Clauses of the First Amendment, stated:

> The solution to the conflict between the Religion Clauses lies not in "neutrality," but rather in identifying workable limits to the government's license to promote the free exercise of religion. The text of the Free Exercise Clause speaks of laws that prohibit the free exercise of religion. On its face, the Clause is directed at government interference with free exercise. Given that concern, one can plausibly assert that government pursues Free Exercise Clause values when it lifts a government-imposed burden on the free exercise of religion. If a statute falls within this category, then the standard Establishment Clause test should be modified accordingly. It is disingenuous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden. Instead, the Court should simply acknowledge that the religious purpose of such a statute is legitimated by the Free Exercise Clause. I would also go further. In assessing the effect of such a statute—that is, in determining whether the statute conveys the message of endorsement of religion or a particular religious belief—courts should assume that the "objective observer," *supra*, at 7600, is acquainted with the Free Exercise Clause and the values it promotes.

See also Estate of Thornton v. Caldor, 472 U.S. 703, 712 (1985) (O'Connor, J., concurring).

II. ESTABLISHED PRINCIPLES OF JUDICIAL REMEDY REQUIRE THE CONTINUATION OF THE PROTECTION AFFORDED THROUGH AN EXTENSION OF THE LEGISLATIVE EXEMPTION.

The court of appeals found Section 19 to be discriminatory and in violation of the Establishment Clause because it "creates a denominational preference by conferring a benefit on members of the religious organizations described in the statute." *Wilson v. NLRB*, 920 F.2d 1282, 1287 (6th Cir. 1990). The court, however, refused to consider Wilson's free exercise claim because the court concluded that "[s]ection 19 does not burden Wilson's practice of his religion." *Id.* at 1290. Of course, the court misses the point. Section 19 was clearly adopted for the constitutionally legitimate purpose of removing a governmentally approved burden on the free exercise of religion and with the correlative purpose of insuring that it would not be misused by employees who did not have a sincere and deep religious conviction that proscribes union membership and financial support.

There is no support in the legislative history of Section 19 or earlier legislative attempts to bestow "special treatment to members of religions having the beliefs described in the statute. . . ." as stated by the court. *Id.* at 1290. At best, the legislation which was to conform the NLRA to Title VII religious accommodation concerns was merely under-inclusive.

The appropriate remedy here would not be to void the legislative will but rather to extend the legislative exemption of Section 19 to all who hold religious beliefs with the same intensity and sincerity as those employees protected under Section 19. This remedy can be provided "within the administrative framework of the statute and without impairing other legislative goals, even though they entail, not simply eliminating an offending section, but rather building upon it." *Welsh v. U.S.*, 398 U.S. 333, 366-

67 (1970) (Harlan, J., concurring). *Accord Iowa Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 244 (1931); *Califano v. Wescott*, 443 U.S. 76, 89-93 (1979). *See also* J. Ginsburg, *Some Thoughts on Judicial Authority & Repair of Unconstitutional Legislation*, 28 Clev. St. L. J. 301, 306-10 (1979)

III. WILSON LACKED STANDING TO CHALLENGE THE CONSTITUTIONALITY OF SECTION 19.

It may be claimed that petitioner Wilson did not establish his art. III standing to litigate the constitutionality of Section 19, although the administrative law judge noted that "[t]his man may very well have been telling the truth as to how he reads the Bible, or as to his personal religious convictions" (decision of administrative law judge in Appendix to Petition for Writ of Certiorari at 20A). In fact, Wilson admitted that his position "was a personal conviction of his upon which he rested his refusal," *id.* at 19a, even though "he relied upon quotations from the Bible." *Id.* Apparently Wilson's claims were generalized, and at no time did there appear to be an attempt upon Wilson's part to demonstrate that his personal objections to joining a labor union were prompted by religious beliefs "held with the same sincerity[1] and depth as those employees expressly covered by section 19 or held with the strength of more traditional religious convictions." *Welsh*, 398 U.S. at 337.

Thus, Wilson made "no attempt to provide a careful definition of the claim to exemption that . . . [he] ask the courts to carve out and protect." *Gillette v. United States*, 401 U.S. 437, 456 (1971). Therefore, there is no showing that Wilson was discriminated against as a result of the wording of Section 19 providing for exemption from union dues and initiation fees for the employee "who is a member of and adheres to established and traditional teachings

[1] The determination of the sincerity of a religious belief is a legitimate issue so long as it is "recognize[d]" that 'sincerity' is a concept that can bear only so much adjudicative weight." *Gillette v. United States*, 401 U.S. 437, 457 (1971).

of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations. . . ."

As this Court stated in *Valley Forge Christian College v. Americans United*, 454 U.S. 464, 474 (1982):

> Proper regard for the complex nature of our constitutional structure requires neither that the judicial branch shrink from a confrontation with the other two coequal branches of the federal government, nor that it hospitably accept for adjudication claims of constitutional violation by other branches of government where the claimant has not suffered cognizable injury. Thus this Court has "refrain[ed] from passing upon the constitutionality of an act [of the representative branches] unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interest entitle him to raise it." *Blair v. United States*, 250 U.S. 273, 279 (1919). The importance of this precondition should not be underestimated as a means of "defin[ing] the role assigned to the judiciary in a tripartite allocation of power." *Flast v. Cohen*, *supra*, at 95.

It should also be noted that if petitioner Wilson had a sincere religious claim he was not without judicial redress. Under Title VII, 42 U.S.C. § 2000e *et seq.*, plaintiff would be entitled to reimbursement with back pay and attorney fees. But even under Title VII, Wilson would have had to demonstrate that his beliefs were religiously based and sincerely held in order to make out a prima facie case. No less should be required of him here.

CONCLUSION

The Court must grant certiorari in this matter. Failure to do so will result in a tragic burden being placed on the free exercise rights of many religious citizens. The case, if allowed to stand, will erode many forms of accommodation that a sensitive government has historically taken to protect the religious practices of such persons.

If certiorari is granted, the Court can vacate the decision of the Sixth Circuit because Wilson lacked standing to challenge the constitutionality of the statute. Alternatively, the Court can find the language of Section 19, "under-inclusive" and remedy any defect by including within the protection of Section 19 all persons who for deeply held sincere religious reasons cannot join or financially support a labor organization.

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